

CONGRESS'S RIGHT TO INVESTIGATE

Two Books Examined

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SENATOR McCARTHY seems to have departed the scene pretty permanently and the hysterical cries of "McCarthyism in the saddle" and "dictatorship" are scarcely heard any more. But many of the real questions raised by Congressional investigations of Communism still remain (as witness the recent inquiry into the theater in New York City). Two recently published books, Telford Taylor's *Grand Inquest* and Alan Barth's *Government by Investigation*, present what might be designated, respectively, as the answers of the liberal lawyer and the libertarian journalist.

The heart of General Taylor's book is its treatment of various legal problems arising in connection with Congressional investigation. For all its brilliance of legal analysis and the professional soundness of its legal conclusions, the book fails to give an authoritative answer to the basic problem of the Constitutional limitations on the right of Congress to investigate Communism. Why should this be so? Fundamentally, I believe,

because such an answer is not to be found within the area of the professional competence of lawyers.

That the legal answers are insufficient is apparent even at what one might call the most elementary level. For if the courts should operate exactly as Taylor hopes they will, witnesses who correctly estimate their rights and adequately present their claims may not go to jail, but will presumably still suffer the infamy and obloquy of the legislative "exposures"—and these are the real grounds for Taylor's dissatisfaction with Congressional investigations.

In every case the resolution, even the legal resolution, of the basic problems raised by Congressional investigations will depend on the evaluation of facts, and on views and opinions as to what *should* be done. The individual citizen will have to resolve these questions as political ones, and little in Taylor's brilliant legal abilities will help him, unless by chance he is faced with the possibility of going to jail on a charge of contempt of Congress.

General Taylor, for example, says of the legal limitations imposed by the First Amendment: "If the First Amendment is to retain any effective force, it must at least be held to mean that freedom of speech and press shall not be abridged, in the interests of national security, one jot or tittle more than may reasonably be regarded as *necessary* to preserve the governmental and constitutional framework which itself creates those freedoms." "If the investigation is . . . carried out in such a way as to impinge upon the constitutional guarantees by forcing individuals to disclose their opinions and associations, then the necessity for such a course of action must be substantially supported."

It is now possible to deal in a calmer atmosphere with the problem of safeguarding our civil liberties while taking the necessary protective measures against Communist infiltration of public life. Here PAUL R. HAYS considers two works devoted to the Congressional investigating committees, Telford Taylor's *Grand Inquest* (Simon and Schuster, 358 pp., \$4.50) and Alan Barth's *Government by Investigation* (Viking, 220 pp., \$3.00). Mr. Hays is professor of law at Columbia University and a frequent contributor to the *Columbia Law Review*, among other periodicals, as well as author of two books, *Cases and Materials on Civil Procedure* and (with Milton Handler) *Cases on Labor Law*. Active at present as a labor arbitrator, he served on the New York State Board of Mediation from 1940 to 1944. Mr. Hays was born in Des Moines, Iowa, in 1903.

Sound as these legal principles are in themselves, they solve precisely nothing for the reader of Taylor's book. For the resolution of these problems depends, for him, as for the courts, on how great the Communist menace seems to him (or to the courts) to be—that is, on his view of the “necessity” for the investigation.

Taylor has no doubts as to the danger of Communism from abroad and consequently believes that “in areas susceptible to espionage, it would appear that the most searching investigation of an individual's political background is both justifiable and desirable.” It is in the field of what he says might be called “domestic and psychological warfare” that he finds excesses which he believes ought to be curbed by the courts. The danger from Communism in this field seems to him to be receding. “If there is a serious present danger from Communist infiltration in these fields, it is surely unfortunate that attention is so rarely focused on current or even recent circumstances, and that instead there is such intense preoccupation with events of five to twenty-five years ago. Even more disturbing is it that our investigators seem so much more concerned about individual political backgrounds than about concrete manifestations of Communist machination.” “It takes no graduate degree to observe that Communist tactics in the United States are—as they must be—vastly different today from what they were fifteen or more years ago.” While he accepts as fair the conclusion that “the Communist Party embodies a conspiracy to overthrow the government,” and “that the conspiracy bulks large in the sum total of the Party's current aspects and activities,” still, “it does not follow that the Party is only and nothing more than a conspiracy, or that every member or adherent is a conspirator.” Communism includes also “a system of thought—the Marxist dialectic,” and “a bundle of attitudes on current political issues, which the Party has promoted much in the manner of political parties generally, by nominating candidates for public office, or publishing newspapers and magazines.” “Even though the Party is dominated by

conspiratorial leaders, therefore, it is apparent that individuals may seek to join it for much less sinister reasons.” Therefore, he asks, “Are all ex-Communists to be regarded as ex-criminal conspirators?”

It is possible, on the basis of the same kind of evidence that Taylor has used, to arrive at different conclusions.

Thus, there is evidence to support the view not only that Communist tactics are not vastly different today from what they were in the 30's, but also that there is no reason for them to be different, because the same tactics are used successfully in the same way. As to the failure to expose “manifestations of Communist machination,” judgment must depend, of course, on what one considers a manifestation of Communist machination. What may seem to one man to be an exposure of such a manifestation may seem to another to be just a further instance of intolerance, nationalism, Know-Nothingism, and McCarthyism. Indeed, some of us who were vigorously anti-Communist in those different 30's may recall our frustration when we sought to expose to our fellow liberals the Communist manifestations of an earlier day—what Taylor calls the “weird *pasticcio* of sharecroppers, poll-taxes, Scottsboro boys, labor organizers and labor spies, munitions merchants and bankers, Spanish loyalists, refugees, boycotts, Russian war relief, Chiang Kai-shek, agrarian reform, the Stockholm ‘peace appeal’ and what not else,” not excluding the purge trials which to so many liberals of that time seemed, as they seemed to Owen Lattimore, to be a proof of Soviet democracy.

The cry of McCarthyism which is raised against anti-Communist liberals of our day when they seek to expose what appear to them to be Communist machinations seems to some of us to be a tactic much like the tactic of crying “Red-baiter” in the 30's and 40's. Even the *pasticcio* could be thought of as having similarities in weirdness—Chiang Kai-shek is still with us, and has been joined by “the unspeakable” Syngman Rhee, the agrarian reformers have become the Mao

Titoists, the Rosenbergs took over where the Scottsboro boys left off, the fight to defend Harry Bridges and other "militant labor leaders" continues, as does disparagement of such leaders as Reuther and Dubinsky; the Spanish civil war has been succeeded by the wars for liberation from "colonialism"; in place of the Stockholm Appeal, we now have not only the Helsinki Appeal but the opposition to German rearmament, and the whole spreading hopefulness as to the new look acquired by the Soviet dictatorship.*

As to the complex nature of Communism—part conspiracy, part philosophy, part politics—there is in Taylor's treatment of this a curious emphasis on legality. Marxism "is not criminal," membership in the Communist party is not "a crime," "there is nothing intrinsically criminal" about propaganda activities, and so forth. If the issue were suppression rather than exposure this emphasis would be more understandable. But Taylor has little patience with exposure and takes severely to task Judge Wyzanski and others who believe that exposure is a valuable safeguard of liberty.

And with this emphasis on legality and impatience with exposure, Taylor moves rather easily into the view that the questioning of ex-Communists is a form of extralegal punishment. The implication of his question as to whether all ex-Communists are "ex-criminal conspirators" seems to be that unless Communist party members be-

long to the *illegal* side of Communism they ought to be immune from the "punishment" of exposure. But if one accepts as true the existence of the conspiracy (and believes the evidence that the purpose of the conspiracy is the destruction of democratic government and the physical annihilation of all opponents of the conspiracy), is it really so shocking an invasion of civil liberties to ask those who have participated in and supported the conspiracy, however innocently, to tell what they know about it?

Again, the answer may depend on how dangerous the conspiracy appears to be. For example, Taylor continually refers to witnesses as being questioned as to their "political affiliations," thus putting the stress on that aspect of Communist activity which is legal. Others might think that the party's conspiratorial activity far overshadows its other aspects, and that interrogation about Communist activity, even the questioning of non-ex-criminal conspirators, might properly be called questioning as to "conspiratorial affiliations." The questioning of innocent members of the Nazi organizations which were designated "criminal" at Nuremberg about the conspiracy to exterminate the Jews was rarely objected to on the ground that it constituted questioning as to political affiliations. In fact, if one considers the Communist conspiracy to be as horrible as was the Nazi conspiracy, there may be some surprise at the serenity with which those who once lent it support look back on their errors, and even at their reluctance to contribute what they can to exposing it. General Taylor quotes as "characteristic" a statement of a Dr. McGill, who refused to name other former members of the Communist party. Dr. McGill, after explaining how he came to join the Communist party, added: "I turned away from Communist ideas when I realized that in practice they were incompatible with my conception of human values." This statement, particularly when taken together with Dr. McGill's reluctance to "inform," appears to fall somewhat short of the passionate revulsion that might be expected, for example, from one

*I hope it is not still necessary to say that people can be for or against some, perhaps even all of these things *without* being Communists. That is not the point now, any more than it was the point in the 30's. Taylor deplores the *ad hominem* argument involved in the exposure of individuals who follow the Communist line and urges that ideas be tested not by personal accusation but rather on the merits. But it was exactly this attitude which led to the Communist successes among liberal Americans in the 30's and 40's. At least in the light of this experience, would it not be well to ask those who have no doubts as to the merits of, say, the idea of peace to consider just what *homines* are back of the Stockholm Appeal, or to ask those who cherish civil liberties and hate racial discrimination to consider just who make up the Civil Rights Congress and the Emergency Civil Liberties Committee?

who, having innocently joined a Nazi organization, later discovers its true purpose to have been the murder of the Jewish people.

LIKE the First Amendment, the Fifth raises problems to which the purely legal answers are insufficient. The provision against self-incrimination has suddenly become one of the Constitution's major bulwarks of freedom. Just how it works this way none of those who have recently written on the subject have succeeded in pointing out. They turn to extensive discussion of the importance of the privilege prior to 1860, but are somewhat less clear about its importance today. In reality, the Fifth Amendment privilege seems to be a rather technical legalistic provision and, in the course of history, its use has been hedged about with considerable legalistic restriction. However, the Supreme Court has recently upheld a very liberal approach to its use. And as Taylor says, whatever its merits, the Fifth Amendment is a part of the Constitution "and so long as that state of affairs endures, the privilege ought to be respected and observed."

But, of course, the issue is not whether the Constitution ought to be "respected," but rather whether witnesses who plead the privilege ought to be respected. So far as I know, no one ever demanded any particular respect for witnesses who pleaded the privilege when asked questions about their participation in murders, robberies, or rapes, although their Constitutional right so to plead is universally conceded. The demand arose only when witnesses began to plead the privilege to protect themselves from answering questions as to Communism. Taylor, whose logic is as sound as his law, is not taken in by this attitude. He recognizes that "there are many situations" in which taking refuge in the plea of privilege "should disqualify a person from public trust or responsibility." But again, law and logic do not suffice. What about lawyers, teachers, factory workers, and actors, Taylor asks. His answer in terms of no "automatic" exclusion

because of the plea is reasonable enough, but only postpones the real decision one more step. The recommendation of the Bar Association Committee, that lawyers who plead the Fifth Amendment be disbarred, he characterizes as a "betrayal of professional responsibilities," "wretched funking," "wrongheadedness," and a "virus" that "is spreading." And yet his argument against the recommendation for disbarment is largely in terms of two New York cases which held that lawyers could not be disbarred for pleading the privilege. Many would agree with him that pleading the privilege should not lead to "automatic" disbarment, but might it not properly lead to a request for an explanation, and are we not then again in the area where one's view of what should be done depends on one's evaluation of the Communist menace?

THE inadequacy of legal solutions is perhaps nowhere better illustrated than in the vexed question of naming others. If a witness, claiming that he himself had subsequently reformed, admitted having belonged to a gang of professional murderers, few people would feel that any special merit attached to his refusal to turn "informer" and to tell who others in the gang were. What is sometimes characterized as the traditional American revulsion against the "informer" would not lead to any great admiration for a reformed ex-SS man who would not give the names of those who helped him to dispose of Jews in the gas chambers. If this seems not to be an analogous situation, that is exactly the point. Whether witnesses before investigating committees should be required to name others depends not on any legal considerations at all, but on the view one takes of the nature, extent, and danger of the Communist conspiracy. "Personal compunctions cannot be permitted to obstruct valid official inquiries, but they are entitled to weigh in the scales when legal authority is lacking," Taylor says. But the question is, of course, what one feels one is weighing.

Factors which may be given varying weights are involved, for example, in the

question of how much reliance a witness who was duped into joining the Communist party, and who failed for a considerable period of time to discern its real purposes, can put upon his own judgment as to who were "innocents" and who were not. Most of the people who knew Alger Hiss, including, for example, Dean Acheson, John Foster Dulles, Felix Frankfurter, and Stanley Reed, would probably have been willing to swear that he was not a Communist at all, and no doubt the non-underground members of his cell would have sworn that he was an "innocent." If they had been called upon to testify as to the names of others they would probably have felt "personal compunctions" against naming Hiss. His activities were so long in the past, no doubt he had long since left the party, his connection with it was based upon the anti-Nazi, pro-Spanish Loyalist, pro-New Deal reasons of most of the party members recruited in the 30's. But a frank disclosure by a disillusioned innocent in 1934 or 1935 might have led to an investigation which would have revealed the truth about Hiss and prevented much of the damage which the nation suffered from the Communist underground.

Taylor believes that Alan Westin's article in COMMENTARY ("Do Silent Witnesses Defend Civil Liberties?" June 1953) "totally overlooks the question of the legal authority of the committees." That a witness has a legal right to protect himself by taking refuge in technical defenses no one can dispute; but to suggest that there is some duty to do so appears unwarranted. A witness may weigh "personal compunctions" against "legal authority," and if he wishes he may raise the issue of the lack of "legal authority" to protect his compunctions, but if he takes this course he cannot properly claim that he is doing it for some other reason such as the defense of civil liberties. And if he does make this claim, then a victory for "personal compunctions" has resulted from his having weighed these compunctions not against any lack of "legal authority" in the investigating committee, but in fact against his moral obligation to

answer—and against the possible danger resulting from his remaining silent.

THIS issue is important in Taylor's discussion of the experience of James A. Wechsler in his appearance before the McCarthy committee. It is Taylor's view that Wechsler named others because "he felt himself gripped" in "a dilemma, born of the illusion of legislative omnipotence." This seems to me to miss Wechsler's point. It is unlikely that Wechsler did not have competent legal advice and that he was unaware of the possibility of resorting to legal devices as an alternative to testifying. What Wechsler did was consciously and resolutely to reject an appeal to legal technicalities. His "personal compunctions" about naming others were occasioned by the character of his inquisitor, and not by any opposition to inquiry as to Communist affiliations. These compunctions he carefully weighed against what he conceived to be his duty. It was no "illusion of legislative omnipotence" which led Wechsler to name others, but rather the fact that his patriotism and his high sense of moral obligation outweighed "personal compunctions."

On James Wechsler's scales a sturdy defense of freedom of the press, a determined opposition to McCarthyism, and an informed awareness of the dangers of Communism outweighed the possibility of resort to the protection of "legal authority." Many will find in Wechsler's courageous resolution of the issues a far greater contribution to civil liberties, and to the downfall of McCarthy, than they can discern in the actions of, for example, Harvey O'Connor and Corliss Lamont, who chose to place the greater weight on "legal authority."

In what he calls the "cold civil war," General Taylor draws the lines between those who have "respect for law and regard for truth," and those "who sow suspicion and fear in our land." He demands that "we be of one mind on the fundamentals of our way of life." But liberals are by definition those very persons who most indulge in that "detachment and individuality" the disappearance of which from American life Gen-

eral Taylor so much deplores. He will surely be able to depend on their aid in his fight against both McCarthyism and Communism, but some of them may trouble him by wishing to put the emphasis of their attack at a little different place in some parts of the battlefield.

ALAN BARTH's book is on the same general subject as Taylor's, but it is so much weaker in analysis and less convincing in argument that the two should hardly be considered together. Even its title, *Government by Investigation*, is an exaggeration, and its approach is unsound in legal analysis and remiss in its astonishing underestimation of Communist influence in this country (it does recognize the danger from without).

Mr. Barth appears, for example, to have the curious idea that Congressional committees which question witnesses whom grand juries have failed to indict are violating ("perverting") the constitutional right to grand jury action in criminal cases. He seems to believe that Congress has no powers except those which some court has "said" it has. He completely misconceives the legal status of a "mere" executive or legislative finding of clear and present danger, and finds it "hard to accept" such a finding, although, of course, under the law such a finding is properly to be considered hard to reject. (Shades of the New Deal days when "liberals" like Barth were denouncing the courts for *not* accepting legislative and executive findings!) His discussion of the Barsky case does not make legal sense. He finds some injustice in the practice of Congressional committees which do not publicly question witnesses who have denied Communist affiliations in executive sessions, and he seems to have the fantastic notion that any investigation of an individual executive employee is a legislative invasion of executive power.

Barth discusses at great length a hearing before Senator Eastland in the course of the Senate Internal Security Committee's investigation of Communist influence in the Southern Conference Educational Fund.

After describing the low character of the ex-Communist witness who testified as to such influence, he states that "by contrast" his principal targets were Aubrey Williams, Clifford Durr (a "former president of the National Lawyers Guild"), Virginia Durr (a "militant champion of civil rights"), Dr. James A. Dombrowski ("head of the Highlander Folk School, an interracial institution at Monteagle, Tennessee"). "All of them had long been outspoken advocates of racial equalitarianism in the South."

Mr. Barth quotes in full, and with obvious approval, the statement Mrs. Durr was prevented from making for the record. In it she denounced the Committee as a "kangaroo court," insisted that witnesses were actually being tried as "traitors," "on the basis of testimony of paid informers," and ended with the words, "I refuse to submit to the authority of this committee and I stand in total and utter contempt of it."

When the ex-Communist witness testified that Mrs. Durr "had full knowledge of the Communist conspiracy when she allegedly persuaded Justice Black to speak to the Southern Conference for Human Welfare in 1938," Mr. Durr, who was present at the hearing, said, "I'll kill that man." When the witness left the stand, "shaking with rage so he could hardly speak [Durr] shouted at [the witness], 'You son of a bitch—talk about my wife like that and I'll kill you.'" Durr then had to be "forcibly restrained from assaulting" the witness.

Of this conduct Barth says: "Perhaps violence—and contempt—were the only responses such a proceeding could evoke among Americans of honor and sensibility. Durr's conduct may have been quixotic, but it was in a tradition Americans have long respected. Mrs. Durr's refusal to answer questions may have been of dubious legal validity, but it surely had much moral justification."

Not only does Barth have no space for any of the very considerable evidence of Communist influence on the Southern Conference (it is enough for him that it purported to advocate "racial equalitarianism"),

but he obviously has little or no patience with law or legal procedures.

Barth believes that "perhaps the most common reason for recourse to the Fifth Amendment" is the desire not to "inform" on others whose "indiscretions were entirely innocent and entirely in the past." (In other words, there should in most cases be an inference of *innocence* drawn from the plea.) Barth is horrified by "informers." He quotes with approval one Dr. Mahaney, a former Communist who refused to identify former fellow Communists, saying: "to be an informer . . . is contrary to every tenet of American thinking. . . . It is a matter of deep and abiding conscience with me. . . . I can only say in accordance with Martin Luther, 'So help me God, I can do no other.'"

But Dr. Mahaney proved in the end to be somewhat less stalwart than Martin Luther. When he was threatened with the loss of his job, he named a number of people who were members of the party in the period from 1935 to 1947, during which time Dr. Mahaney persisted in the innocent indiscretion of membership in the Communist party "because he mistakenly believed it was devoted to promoting world peace and disarmament." He named his former wife "as a companion at Communist meetings." The immolation of this latter-day Luther is criticized by Barth as follows: "What manner of investigation is it that will stretch a human spirit upon a rack as cruel in its way as any in the torture chambers of the medieval Inquisition in order to wrest from him, not a confession of his own heresy—he had confessed that long since—but an accusation leveled at old friends, leveled even at the woman he had once promised to honor and to cherish?"

Barth has pity, perhaps mixed with a little contempt, for Bishop Oxnam, who by testifying "found himself helping the committee in its efforts to discredit Professor [Harry F.] Ward" ("one of the great liberal and inspirational leaders of the Methodist Church").

In view of Barth's small reliance on the "legal authority" on which Taylor relies so

heavily, and in view of the "common sense" of the American people, who *will* persist, as Barth recognizes, in thinking the worst of a witness who pleads the Fifth Amendment, what does the author suggest that his martyrs do? Why, defy the Committee. This may be "altogether unwarranted in law" and "it may also reflect a mistaken estimate of the particular persons it is intended to protect" (i.e. they may in fact be spies and traitors), but "it is an open and candid assumption of individual moral responsibility of a sort that is expected of men and women in a society where the individual conscience is recognized as the supreme authority. . . . And if it does not save the pleader from prison, it will save him at least from an enduring sense of shame." And a course which is "open alike to persons who never joined the Communist party and to those who once were members of it, is the course of protest. If a witness believes deeply that he cannot in good conscience cooperate with a committee which, in his judgment, is encroaching improperly on individual freedom, he can refuse, as Professor Albert Einstein suggested, to answer any of its questions, even those relating exclusively to himself." This course may "win the plaudits, and the gratitude, of posterity."

I do not know why Mr. Barth does not mention that this course is also "open to" *present* members of the Communist party. Perhaps it is because he does not believe that there are any. One might come to that conclusion from reading his book.

IT SEEMS to me that General Taylor, in his concentration on the law, has failed adequately to evaluate the evidence, while Mr. Barth's contempt for the law has led him to ignore both law and evidence. Perhaps it is time now, when a calmer attitude prevails, for a judicious re-examination of the whole issue, a careful evaluation of the evidence of the extent of the Communist menace in an atmosphere free alike from the bawlings of McCarthy and the yowlings of those whose fears were so assiduously whipped up by cries of McCarthyism.